



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 28, 1993

Ms. Maria Teresa Guerra
Assistant Attorney General
Office of the Attorney General
Tort Litigation Division
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548

OR93-583

Dear Ms. Guerra:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former article 6252-17a, V.T.C.S.).¹ Your request was assigned ID# 21846.

The University of Texas System ("UT") has received a request for information regarding an alleged sexual assault that occurred on the Austin campus in October 1990. Specifically, the requestor seeks:

The full name [of Richard King], date of birth, his permanent address, his current or latest address and telephone number, his academic status, his major, hours completed and any other directory information available.

[T]he same information on Melina Padilla.

[T]he UT Police narrative as well as full UT Police report regarding the alleged sexual assault of Padilla.

You contend that much of the information is excepted from disclosure by sections 552.101, 552.103, 552.107 and 552.108 of the act. You also ask whether directory

¹We note that V.T.C.S. article 6252-17a was repealed by the 73d Legislature. Acts 1993, 73d Leg. ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

information concerning the individuals is subject to disclosure and whether section 552.117 excepts from disclosure Mr. King's address and telephone number. We address your arguments in turn.

Section 552.103(a) excepts information

- (1) relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party; and
- (2) that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Section 552.103 was intended to prevent the use of the Open Records Act as a method to avoid discovery rules. Attorney General Opinion JM-1048 (1989). However, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103. You state that the complete police report has been released to the opposing party to the pending litigation pursuant to a discovery request. Therefore, section 552.103 no longer applies to the requested information.

Next, you contend that section 552.107 excepts the information from required public disclosure. Section 552.107 excepts information if:

- (1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas; and
- (2) A court by order has prohibited disclosure of the information.

You argue that "the State Bar's mandate concerning trial publicity implicates" section 552.107. State Bar Rule 3.07(a) provides:

In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that there will be a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

Gov't Code Tit. 2, Subtit. G--Appendix. Section 552.107 excepts from disclosure information protected by attorney client privilege, *see* Open Records Decision No. 574 (1990), and information prohibited from disclosure by court order, *see* Open Records Decision 143 (1976). State Bar Rule 3.07(a) does not concern either of these types of information. Furthermore, the requested information is not protected by the attorney client privilege, nor is it subject to a court order prohibiting its disclosure. Therefore, section 552.107 does not pertain to the requested information.

You also claim that section 552.108 excepts the requested information from disclosure. Section 552.108 provides:

- (a) a record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021.
- (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021.

Traditionally, when applying section 552.108, our office has distinguished between cases that are still under active investigation and those that are closed. In cases that are still under active investigation, this section exempts from disclosure all information except that generally found on the first page of the offense report. *See generally Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975,) *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1977). Once a case is closed, information may be withheld under section 552.108 only if its release "will unduly interfere with law enforcement or crime prevention." *See Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Attorney General Opinion MW-446 (1982); Open Records Decision Nos. 434, 444 (1986). You state that a grand jury has not billed Mr. King in this matter; although you state that the victim is currently seeking to have the case reconsidered, you have not provided us with any evidence that the assault is still under investigation by the UT police or the district attorney. In addition, we have no evidence to conclude that release of the documents will unduly interfere with law enforcement or prosecution. Therefore, we conclude that you may not withhold the requested information pursuant to section 552.108.

You contend that some of the information is excepted by section 552.101, which excepts from disclosure "information considered to be confidential by law, either Constitutional, statutory, or by judicial decision." One of the records in this file pertains to polygraph examinations and results that are confidential under section 19A(b) of article 4413(29cc), V.T.C.S. *See* Open Records Decision No. 430 (1985). The requestor is not included in the list of persons or agencies to which the polygraph information may be disclosed. *See* V.T.C.S. art. 4413(29cc), § 19A(c). We have marked the document that contain information about the polygraph examination conducted as part of the

investigation. You must withhold the polygraph information pursuant to section 19A of article 4412(29cc).

Under section 552.101, information may also be withheld on the basis of common-law privacy if it is highly intimate or embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and there is no legitimate public interest in its disclosure. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision Nos. 579 at 2, 562 at 9, 561 at 5, 554 at 3 (1990). The detailed description and identity of a victim of alleged sexual assault is ordinarily protected by common-law privacy. Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) (holding that the nature of the information at issue in the case, names of witnesses and detailed affidavits regarding allegations of sexual harassment, was exactly the kind specifically excluded from disclosure under the privacy exception as described in *Industrial Foundation*). We believe that the victim has waived any common-law privacy protection with regard to her identity when she filed a civil lawsuit against the alleged attacker and UT in state district court. However, she did not waive common-law privacy with regard to her statements in the police reports about the alleged sexual assault. We have marked those portions of the police reports that you must withhold to protect the victim's common-law privacy interests.²

You next ask whether you may redact identifying information about UT students contained in the police reports. Section 552.114 excepts "information in a student record at an educational institution funded wholly or partly by state revenue." Section 552.026 incorporates the federal Family Educational Rights and Privacy Act of 1974 ("FERPA") into the Open Records Act, providing:

This chapter does not require the release of information contained in education records of an educational agency or institution except in conformity with the provisions of the Family Educational Rights and Privacy Act of 1974, Sec. 512, Pub. L. No. 93-380, 20 U.S.C. Sec.1232g.

See also Open Records Decision No. 431 (1985). FERPA restricts funding to educational agencies that have a practice of releasing education records or personally identifiable information contained in such records without the written consent of the student or a parent. 20 U.S.C. § 1232g(b)(1). FERPA defines "education records" as records which:

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

²You claim that the doctrine of false light privacy prohibits the release of the information. However, we specifically stated in Open Records Decision No. 579 (1991) that section 552.101 does not incorporate the common-law tort of false light privacy.

Id. § 1232g(a)(4)(A). However, education records do not include records maintained by university campus police departments that were created for the purpose of law enforcement. Open Records Decision No. 612 (1992) at 2; *see also* 20 U.S.C. § 1232g(a)(4)(B)(ii). The requested police reports are not considered educational records subject to FERPA; therefore, you may not redact identifying information regarding UT students.

You also ask whether you are required to release directory information regarding Mr. King and Ms. Padilla. Directory information may be disclosed after compliance with FERPA notice requirements. *See* Open Records Decision Nos. 244 (1980), 96 (1975). An educational agency may disclose directory information only if the agency gives prior public notice to affected students of their right to object to disclosure. 34 C.F.R. § 99.37 (1992). You must therefore release any directory information to which no objection has been raised pursuant to FERPA.

Finally, you ask if you are required to release Mr. King's home address and telephone number held by UT as directory information and contained within the police report. You state that while Mr. King was employed at UT he elected to prohibit public access to this information pursuant to sections 552.117 and 552.024 of the act. This question raises a new issue that we have not addressed in previous open records decisions. We therefore reserve a determination on this question to be answered in a formal open records decision. You may withhold Mr. King's home address and telephone number pending the outcome of our decision on this matter.

In summary, we have marked the portions of the documents you must withhold pursuant to section 552.101; you may also withhold Mr. King's address and telephone number pending the outcome of our open records decision. The remainder of the requested information must be released in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Loretta DeHay", with a long, sweeping horizontal line extending to the right.

Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/KKO/rho

Ref.: ID# 21846

Enclosures: Marked documents

cc: Mr. Gardner Selby
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(w/o enclosures)